Supreme Court, U.S.
FILED

No. 05-389 SEP 23 2005

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In The

Supreme Court of the United States

FRANK M. PATTI, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Could a jurist of reason conclude that this Court's decision in *United States v. Booker*, 543 U.S. ___, 125 S.Ct. 738 (2005), was retroactively applicable to cases on collateral review under circumstances where the sentence became final after *Ring v. Arizona*, 536 U.S. 584 (2002)?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Frank M. Patti, Sr. respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit. The court of appeals denied Mr. Patti's application for a certificate of appealability to review the district court's denial of his motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255.

OPINIONS BELOW

This case originated in the United States District Court for the Northern District of Florida. On January 19, 2005, Frank M. Patti, Sr. ("Petitioner" or "Mr. Patti") filed a timely motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 in which he sought to be resentenced in light of *United States v. Booker*, 543 U.S. ___, 125 S.Ct. 738 (2005). Petitioner's conviction became final after the decisions of this Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), but before the decisions of this Court in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004) and *Booker*.

Mr. Patti's § 2255 petition was referred to a United States Magistrate Judge, who issued a Report and Recommendation recommending that the petition be denied on the grounds that *Booker* was not to be applied retroactively to cases on collateral review. *See* Appendix 5-10. On February 25, 2005, the district court entered an order (over Mr. Patti's objections) adopting the Report and Recommendation

and entered judgment denying Mr. Patti's § 2255 motion. *See* Appendix 3-4.

Petitioner filed a notice of appeal, which the district court construed as a motion for a certificate of appealability. This motion was denied. *See* Appendix 2. On May 4, 2005, Mr. Patti filed an application for a certificate of appealability in the United States Court of Appeals for the Eleventh Circuit, which was denied on May 23, 2005. *See* Appendix 1.

FEDERAL JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on May 23, 2005. On August 11, 2005, Petitioner submitted an application to extend the time to file a petition for a writ of certiorari. The Honorable Anthony M. Kennedy granted Petitioner's application (No. 05A149) and extended the time to file until September 23, 2005. As such, this petition is timely filed pursuant to Sup. Ct. R. 13.1, 13.3. The United States District Court for the Northern District of Florida had original subject matter jurisdiction of this case pursuant to 28 U.S.C. § 2255, governing motions to vacate, set aside, or correct sentence, and 18 U.S.C. § 3231 (federal criminal case). The court of appeals had jurisdiction over this appeal pursuant to 28 U.S.C. § 2253(c).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review,

the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –